No. 48659-8-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

MARGIE M. LOCKNER, a single woman,

Appellant,

vs.

PIERCE COUNTY, a political subdivision of the State of Washington; and BLAIR SMITH, individually, and as an employee of Pierce County,

Respondents.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 15-2-05353-7

BRIEF OF APPELLANT

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I. INTRODUCTION

Margie M. Lockner was riding her bicycle on the Foothills Trail in Pierce County when she was pelted by rocks and debris from a lawnmower being negligently operated by Pierce County employee, Blair Smith. In her attempts to shield herself from the debris, Ms. Lockner lost control of her bicycle and fell – severely injuring her knee.

Ms. Lockner sued and the trial court dismissed her case under RCW 4.24.210 – Washington's recreational immunity statute. The trial court's decision to dismiss on summary judgment was erroneous for the following reasons.

First, because the Foothills Trail serves both recreational and transportation purposes, pursuant to Camicia v. Wright Construction Co., 179 Wn.2d 684, 317 P.3d 987 (2014), RCW 4.24.210 (recreational immunity) was not available as a defense.

Second, where liability stemmed from the negligent operation of the lawnmower, not a defect on the Foothills trail, the case was a negligence case, rather than one based on a theory of premises liability. As such, it was erroneous to dismiss the case under RCW 4.24.210. Where Ms. Lockner could make a prima facie showing of each of the elements of her negligence claim, the trial court should not have dismissed her case under CR 56.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted defendants' motion for summary judgment pursuant to RCW 4.24.210 (recreational immunity).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it dismissed Ms. Lockner's case under RCW 4.24.210 (recreational immunity).

IV. STATEMENT OF THE CASE

A. Procedural History

Following the statutory period for notice of claim, pursuant to RCW 4.96.020, Ms. Lockner filed this case against Pierce County on January 21, 2015. The complaint was a short and plain recitation of the facts pursuant to the Court Rules. The complaint specifically alleged negligence related to her fall on the Foothills Trail in Pierce County, Washington. On April 2, 2015, Pierce County filed a motion to dismiss pursuant to CR 12(c). That motion was denied.

On May 8, 2015, Ms. Lockner amended her complaint and added Pierce County employee, Blair Smith (the operator of the injury-causing lawnmower) to the case as a defendant. CP 1-4. Following several depositions, on January 22, 2016, the trial court dismissed Ms. Lockner's case on summary judgment, finding that RCW 4.24.210 shielded the defendants from liability. CP 118-19. Specifically, the trial court stated:

> I think it is pretty clear from the evidence that has been presented to the Court in the materials that the primary purpose of this Foothills Trail is recreation. There may be a use for transportation or some convenient way to get between different locations that are not recreational. I think the primary purpose of it, in looking at the materials that were provided, is as recreational. I don't think the Carmicia case necessarily applies to what this Court has to decide in this case. It is an area that is under the control of the County. It is an area they restrict the hours that it is open. They can open and close it. There is no evidence of an intentional injury. Appeared to be – I think it does fall under the recreational use immunity.
>
> I am going to grant the motion for summary judgment.

RP 23:7-22.

This appeal timely follows.

B. Facts

According to the Pierce County Website, the Foothills Trail is described as "*a popular commuter route* and recreational destination for bicyclists, while hikers enjoy shorter, more manageable segments of the trail." CP 62 (emphasis added). Within the Pierce County Park, Recreation & Open Space Plan, "Regional Trails Plan," the "Regional Trail Vision" is defined as:

> The Pierce County Regional Trails System will be an accessible and seamless trails network used by people of all ages and abilities *for recreation and transportation.* Pierce County trails will provide users with the opportunity to experience recreation, solitude or companionship, *and provide a practical transportation option. It will offer connections to major developed areas and attractions within the County,* provide opportunities for appreciation of nature, *and connect the County to the greater region.*

CP 66 (emphasis added).

On July 10, 2013, Margie Lockner, plaintiff herein, was riding her bicycle on the Foothills Trail in Pierce County. CP 74, page 9:13-15. According to Ms. Lockner:

> My niece and I were riding in single file. I was residing (sic) behind her. We rounded a curve in the bike trial and encountered Blair Smith who was driving a riding lawn mower. She was on my right mowing grass next to the paved trail and driving at a fast rate. She rode by us and in the process debris (dust, grass, rocks, etc.) from the lawn mower was thrown into the path and swirled up into my eyes. I put my hand up to my eyes to shield them from the debris, and attempted to veer out of the way when I lost my balance, clipped Justine's back tire and crashed. I was very upset, frightened and in pain. I was afraid that I was going to lose my leg. My niece is a nursing student, and she tried to calm me as much as possible. While I was laying on the ground, I saw that Ms. Smith had stopped up ahead. I remember my niece Justine asking if anyone had a phone. Ms. Smith left the scene of the accident, I did not know where she went. I was pretty much in shock.

CP 80.

At the time of this incident, defendant Blair Smith was 20 years old and working as a maintenance worker for Pierce County. CP 83, pages 7-8. Part of her duties were to mow the lawn, something she had been trained by her supervisor, Dennis Bilderback, to do. CP 83-84, pages 9, 14. The mower she was using was a "riding lawn mower" that discharged the grass and other debris out the rear of the mower. CP 89, pages 18-19.

As it related to her training and what to do when mowing near people, Ms. Smith was taught to "idle down the mower," "keep [her] head on a swivel, and "[w]atch for people and objects." CP 84, pages 14-15. Specifically, when asked whether he trained his employees to try and make sure no people were behind the mower when being operated, Mr. Bilderback actually took it a step further, stating, "No, I would say they are not taught to make sure nobody is behind them. In general, they are taught to try to make sure nobody is around them period." CP 89, page 20:5-8. Mr. Bilderback then stated the purpose for that rule: "Even though they are rear discharge mowers doesn't mean if you were to hit something it's going out the back. It could go out anywhere." Id., page 20:10-12. He further clarified what he taught his employees to do:

> Be aware of their surroundings the best they can while trying to watch where you are mowing. If somebody comes up, shut the blades off. If the motor is revved up or whatever that's one thing, if the blades aren't swinging hopefully nobody gets hit.

Id., page 20:20-25.

As it related to terms like "engine speed" and "idling the blade," Mr. Bilderback explained that the lawn mower has two pedals on the floor that control the direction and speed of the mower. CP 89-90, pages 21-22. There is also a "throttle" which controls the engine speed which controls "the speed of the blade." Id. There is also a separate "shut off" switch for the blades. CP 90, page 23:4-6.

When asked about the purpose of idling the mower, Mr. Bilderback clearly outlined that when people are nearby the operator of the mower must idle down the blades so as to make sure nobody is hit with debris. Id. Specifically, he stated the following during his deposition:

Q: Okay. So then if I understand your testimony correctly, if a person is mowing a lawn and they come up on a mole hill or on some gravel or something that is loose, they are taught to slow the throttle down; is that fair to say?

A: Yes, and shut the blades off.

Q: And there's a separate –

A: There is a separate shut off. It engages the blades or it disengages the blades.

Q: And does the same apply if people are nearby, the same rule of thumb?

A: Yes.

CP 90, page 22:20-23:11 (objections omitted).

Following this incident, Ms. Smith filed two incident reports. The first one was submitted on the day of the incident. Where she was asked to describe the incident, Ms. Smith stated:

> On July 10, 2013 on the Orting trail (02-056) I was mowing on the right side of the trail when I saw 2 bikers coming up on my left side. *I stopped the mower*. As the second bicyclist passed me, she fell and injured her knee. I dialed 911 immediately. She was then taken to Good Sam hospital.

CP 92 (emphasis added).

In the second incident report, Ms. Smith described the incident slightly differently:

> On July 10, 2013, I was mowing one FHT. As two bikers approached from behind me, *I stopped the mower and idled down the engine*. One of the bikers lost control and fell, injuring her knee. I dialed 911…

CP 94 (emphasis added).

As can be seen, in the first incident report, Ms. Smith made no mention of "idling the engine" or slowing the blades as she was taught when people were nearby. In the second incident report, written roughly 40 days later, she did say that she "idled down the engine." CP 92, 94.

Importantly, the July 10, 2013 incident was not Ms. Smith's first time causing debris to be dangerously projected. She previously had to fill out an incident report for shooting rocks from the trail towards someone's car, causing the car's windshield to crack. CP 85, pages 22-24, CP 86, pages 25, 27. She also previously ran a maintenance truck into a pole. CP 86, page 25. In those incidents Ms. Smith only completed one incident report.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNDER RCW 4.24.210.

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When the facts are undisputed, immunity is a question of law for the court. See Beebe v. Moses, 113 Wn.App. 464, 467, 54 P.3d 188 (2002); Botka v. Estate of Hoerr, 105 Wn.App. 974, 983, 21 P.3d 723 (2001). But where material facts are disputed, a trial is needed to resolve the issue. Camicia v. Howard S. Wright Constr. Co., 317 P.3d 987, 179 Wn.2d 684 (2014). Because recreational use immunity is an affirmative defense, the landowner asserting it carries the burden of proving entitlement to immunity under the statute. See Olpinski v. Clement, 73 Wn.2d 944, 950, 442 P.2d 260 (1968). Cases dismissed on summary judgment are reviewed *de novo*. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999).

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1. Where Material Facts Suggested The Foothills Trail Is A Mixed Use Trail, The Trial Court Erred In Dismissing Under RCW 4.24.210.

RCW 4.24.210 "creates an exception to Washington's premise liability law regarding public invitees." Camicia, 179 Wn.2d at 694. It gives immunity to "owners or others in possession of land" for injuries to recreational users, including bicyclists. RCW 4.24.210. However, where an issue of facts exists as to whether the land is open for transportation purposes, as well as recreational uses, summary judgment should be denied. See Camicia, 179 Wn.2d at 687.

In Camicia, our Supreme Court reversed summary judgment under RCW 4.24.210 where the land in question potentially served purposes other than solely recreational. In that case, the plaintiff was riding her bike on a trail parallel to I-90 when she collided with a wooden post on the trail and was seriously injured. Camicia, 179 Wn.2d at 687. The Court outlined the background of RCW 4.24.210 and concluded that dismissal was inappropriate where material facts existed suggesting the trail was not open only for recreation but also for purposes of transportation ("it would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.") Id. at 697. The Court addressed the dual uses of bicycles:

> Bicyclists enjoy an anomalous place in the traffic safety laws of Washington. . . . Statutes variously treat bicycles and bike paths in a recreational context, and at other times the statutes treat them as part of the transportation system. These statutes indicate the Legislature has viewed bicycles and paths on a case by case basis, and without any continuity. . . . Thus, proof that land is opened for bicycling is not proof that it is opened for recreational purposes.

Id. at 700 (internal citations omitted).

Here, the trial court was presented with material facts suggesting the Foothills Trail serves a transportation purpose along with recreational opportunities. CP 62-71. Specifically, the

Pierce County Website describes the Foothills Trail as "*a popular commuter route* and recreational destination for bicyclists," (CP 62) and the Pierce County Park, Recreation & Open Space Plan, "Regional Trails Plan," defines the "Regional Trail Vision" as:

> The Pierce County Regional Trails System will be an accessible and seamless trails network used by people of all ages and abilities *for recreation and transportation.* Pierce County trails will provide users with the opportunity to experience recreation, solitude or companionship, *and provide a practical transportation option. It will offer connections to major developed areas and attractions within the County*, provide opportunities for appreciation of nature, *and connect the County to the greater region.*

CP 66 (emphasis added).

The trial court acknowledged that the trail is a mixed-use trial but concluded that the "primary purpose" of the trail is recreational and that that distinguished Ms. Lockner's case from Camicia. The trial court's conclusion was erroneous – as Camicia could not have been clearer on this issue:

> Immunity applies only when a landowner allows the public to use the land "for the purposes of outdoor recreation." This reading is in accordance with the statute's plain language and the legislature's stated purpose to "encourage" land possessors to make their land" available to the public for recreational purposes by limiting their liability." Where land is open to the public for some other public purpose--for example as part of a public transportation corridor--the inducement of recreational use immunity is unnecessary. It would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.

Camicia, 179 Wn.2d at 697 (internal citations omitted).

The Supreme Court further stated:

> Distinguishing between recreating and nonrecreating users would strip Washington landowners of their statutory protection by hinging recreational immunity on the one factor not mentioned in the statute and over which a landowner has no control: the intent of a public invitee. Because landowners cannot tell the private intentions of one invitee from another, they cannot keep those engaging in permitted activities but for nonrecreational reasons off the land, and therefore cannot limit their

> liability. A rational landowner faced with such a rule would have every incentive to close the land to the public entirely. This is especially true because the landowner would be forced to take all the same precautions to safeguard the land opened up for public recreation as would apply in the absence of RCW 4.24.210, since he would still owe a greater duty of care to those who enter but are not recreating. The legislature plainly intended statutory immunity to apply based not on the intent of the public invitee, but on the landowner's action in opening land to the public for recreation.

Id. at 702.

Here, because material facts show the Foothills Trail is open for transportation purposes, as well as recreational, pursuant to the analysis in Camicia, the trial court erred when it dismissed Ms. Lockner's case and reversal is respectfully requested.

2. Summary Judgment Was Improper Because The Case Was Based On Negligence Rather Than "Premises Liability."

The term "negligence" is defined as conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1996). A negligence claim requires a showing of a duty, breach, causation and damages. Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574 (2006).

Ms. Lockner provided the trial court with material facts suggesting Ms. Smith violated her duty of due care by not slowing the blades and allowing rocks and debris to be propelled at people, after all, such action was contrary to her training. Ms. Lockner showed that, by shielding her face and eyes from the propelled debris, she lost control of her bike and fell, seriously injuring herself. She was therefore able to show that, but for the negligent actions of Ms. Smith, she would not have been injured. It was the actions of defendants that caused the injuries, not the conditions of the trail.

In other words, Ms. Lockner easily made a prima facie case of negligence and it was erroneous for the trial court to extend the land-use immunity set forth in RCW 4.24.210 to the

point of giving Pierce County total immunity from liability for all negligent acts occurring on its property just because Ms. Lockner was riding a bicycle. After all, Ms. Lockner was not contending that she fell off her bike because she hit a crack in the pavement or because the trail was not wide enough – she claimed that an agent of Pierce County actively breached the duty of due care and caused her injury. She would have made the same claim if she was run over by a maintenance vehicle on the trail or shot by a sheriff's deputy negligently target-shooting on the land. As this Court is aware, trial courts must "avoid any reading of [a] statute that would result in unlikely, absurd, or strained consequences." State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). That is what occurred when the trial court dismissed Ms. Lockner's case. Respectfully, this Court should reverse that finding.

VI. CONCLUSION

Based on the above cited facts, authorities and analysis, it is respectfully requested that this Court reverse the trial court's dismissal on summary judgment.

DATED THIS 6th day of June, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Plaintiff

By: _____
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

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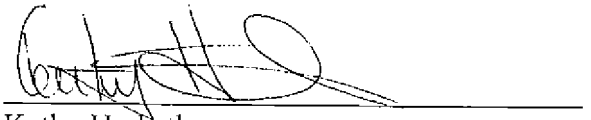
Signed at Tacoma, Washington this 6th day of June, 2016.



Kathy Herbstler

HESTER LAW GROUP, INC., P.S.

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